LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
FEB 10 1976
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

October Term, 1975
No. 75-847

BEFWICK OF PHILADELPHIA, INC.,
Petitioner

v.

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY t/a THE PUBLIC LEDGER BUILDING,
Respondent

On Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

PETITIONER'S REPLY BRIEF

PAUL AUERBACH,
Attorney for Petitioner

212 Sycamore Avenue
Merion, Penna. 19066

Merrelle Printing Co., Law Printers, Box 100, Bryn, Pa. 19020

Argument

PETITIONER'S REPLY BRIEF

Respondent—on page 10 of its brief—argues that the Pennsylvania Supreme Court was never requested to review the issue of lack of opinion by the Superior Court and therefore Befwick cannot raise said issue before this Honorable Court. Respondent cites *Amalgamated Food Employees Union vs. Logan Valley Plaza, Inc.,* 391 U.S. 308, 313, fn. No. 6, and Pennsylvania Supreme Court Rule 52 in support of its position.

It is clear that the cited case does not support Respondent's position. Footnote 6 merely records the fact that the union had not raised one of its arguments before the state court without determining the legal effect thereof. In footnote 1 the Court specifically noted that it did not discuss said argument because it had already decided the case in favor of the union on other grounds.

As to Rule 52 of the Pennsylvania Supreme Court it is relevant to note that Respondent does not set forth the text of the rule it wishes the Court to review. In fact, said sule in its last sentence provides: "no point will be considered which is not set forth in or *necessarily suggested by the statement of questions involved".* The fact is that your Petitioner set forth the failure of the Superior Court to issue an opinion in its Petition for Allocatur before said Supreme Court (Paragraph 5, R. 18a) and then covered it as part of Statement of Questions Involved, number 4.

Argument

Throughout its brief Respondent continually refers to the "Trial Court" deciding this or doing that. Respondent's counsel knows the difference between a Trial Court and a Motion Judge and one is forced to conclude that at very least there is an effort to mislead this Honorable Court. At no time in the entire history of this case was there a trial or even a scheduling of a trial. Judge Hirsch was at all times a Motion Judge who rubber-stamped the consent decree of November 14, 1972 and then, over Petitioner's objection, dismissed its petition to set aside the writ of possession without allowing Befwick the opportunity to take depositions and/or have a hearing.

In this latter regard, Petitioner notes that on page 3 of Respondent's brief it claims that Petitioner chose not to take depositions. As respondent well knows, Petitioner was in fact precluded from taking depositions by Judge Hirsch as is set forth in Petitioner's brief in the statement of facts (page 4) and in footnote number 2 (page 11).

Finally, Respondent claims on page 5 of its brief that Petitioner wants this Honorable Court to review the merits of its claim. This is patently false. Petitioner, on page 12 of its brief, specifically notes that the merits of the case are not before the Court. An unbiased reading of Petitioner's brief compels the conclusion that everything was geared to the lack of procedural due process.

However, Respondent—after averring this inaccurate statement—goes into great detail on the merits with the obvious intent to persuade the Court to overlook the glaring procedural injustice by reason of Respondent's biased view of the case. Petitioner is to be condemned without

an opportunity to explain and prove its view of the facts and interpretation of the relevant law. Respondent is quite aware that Petitioner—once granted a hearing—stands an excellent chance of prevailing and its attempt to argue its side of the merits instead of the procedural issues should be rejected. The fact that the lower Court failed to discuss the issues material to the merits and the Pennsylvania appellate courts ignored said lower court opinion but refused to give any reasoned explanation in its place proves that the issues are far from clear.

Wherefore, it is respectfully requested that this Honorable Court grant the petition for writ of certiorari.

Respectfully submitted,
PAUL AUERBACH,
Attorney for Petitioner.

212 Sycamore Avenue
Merion, Penna., 19066
1-215-841-4258